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No. 90-1649 (2)

IN THE

Supreme Court of the United States

October Term, 1991

FERNANDO ROJAS,

Petitioner,

against

ALEXANDER'S DEPARTMENT STORE, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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(6516—LC3-843)

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should consider the applicability of *Monell* to private corporations where Petitioner neither pleaded nor proved a theory of *respondeat superior* liability.

2. Whether the jury should have been asked to determine if Petitioner was discriminated against on the basis of his color when the only direct evidence he offered at trial was that he was discriminated against on the basis of his Spanish extraction.

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FERNANDO ROJAS,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent prays that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in *Rojas v. Alexander's Department Store, Inc.*, No. 90-7306 (2d Cir. Nov. 29, 1990), be **denied.**

OPINIONS BELOW

The opinions below have been accurately reproduced in Petitioner's Petition for Writ of Certiorari.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> Section 1...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983 provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

COUNTER STATEMENT OF THE CASE

Petitioner's account of the facts of this case, so far as recited, is substantially correct. However, Respondent draws this Court's attention to the following additional matters:

Originally, Petitioner sued Alexander's for false arrest, false imprisonment and a Section 1983 violation

on the theory that Alexander's had a policy of unlawfully targeting persons of "Spanish extraction" for shoplifting arrests. Petitioner's wife, Petrucia Rojas, also sued as a co-plaintiff under Section 1983, claiming that she was embarrassed by her husband's arrest.

Alexander's moved to dismiss all charges. The district court dismissed the state tort claims of false arrest and false imprisonment as being time barred under New York State Civil Practice Law and Rules Section 215(3) and dismissed the Section 1983 claim of Petitioner's wife because she had not demonstrated any deprivation of a federally protected right. However, the Court found that Alexander's

decision to employ a "special patrolman" was sufficient invocation of state law enforcement authority to satisfy Section 1983's "color of law" requirement.

The gravamen of Petitioner's second amended verified complaint was that he was victimized by a policy and custom at Alexander's to discriminate against Hispanics by subjecting them to increased scrutiny and unlawful arrest. After pleading that he was a person of South American (Spanish) extraction, Petitioner alleged:

> Defendant Alexander's Department Store, Inc. has a policy and practice of longstanding whereby its agents in their surveillance of the customers in the store, pay special attention to blacks and persons of Spanish extraction and discriminate against them in that they cause such persons to be charged more often than white persons of [sic] violation of New York Criminal Laws and in conjunction with the Police

> Department of New York City, cause them to be arrested without probable cause, thus using the state criminal statutes and their proscriptions of illegal activities as a vehicle for discrimination against such persons of Spanish or Negro extraction.

Neither in the pleadings nor at trial was there any reference to a conspiracy to arrest Petitioner on something less than probable cause. The conspiracy theory was always a function of claimed unlawful discrimination against Hispanics. In response to a question by the district court regarding the alleged conspiracy, Petitioner's counsel explained:

> Here is my contention that the employees of Alexander's were following a policy of harassing and arresting Hispanics. And that the [special] police officer Iris Luck conspired with them ---

> she was supporting their policies by making the arrest (A-172).

The trial court then asked pointedly whether the arrest was wrongful *because of* the alleged harassment of Hispanics, to which counsel responded, "Yes" (A-175).

The only direct evidence of discrimination against the Petitioner was his own disputed testimony that he was called a "spic" or a "spic mother fucker" after his arrest; the Petitioner admitted that otherwise he was treated with respect by the Respondent's employees. Moreover, Jerry Diaz, the employee who arrested Petitioner, did not speak with Iris Luck, the "special" police officer employed by Alexander's. Luck's role in the arrest was purely administrative; that is, doing a warrant check, obtaining an arrest number, and signing the summons.

There was no direct evidence that Petitioner suffered discrimination on grounds of skin color. Petitioner introduced Alexander's arrest records at trial, which noted the race/ethnic background of each arrestee. However, Alexander's proved at trial that keeping such records was an industry custom and that other major retailers such as Macy's, Bloomingdale's and Gimbel's kept virtually identical arrest logs.

These arrest records showed that in 1984 at Alexander's Rego Park store, where Petitioner was arrested, the race/ethnicity of the arrestees, as a percentage of total arrests, was as follows:

Blacks	43%
Caucasians	32%
Hispanics	20%
Asian/other	5%

These statistics were agreed to by counsel for both sides during discovery, and were virtually identical to the arrest percentages for 1982 and 1983. The arrest logs also showed that Diaz had arrested a total of 17 Caucasians and 5 Hispanics during 1984.

Petitioner's counsel argued in summation, over the objection of the Respondent, that Alexander's had a policy of discriminating against "minorities," but nevertheless the jury found, in response to a special interrogatory, that Alexander's had *no* "policy, custom or usage to discriminate against Hispanic customers on

account of their race or national origin by subjecting them to increased suspicion or baseless arrest for shoplifting."

While Petitioner objected to the trial court's refusal to charge on the basis of generic "minority" discrimination by Alexander's, no objection was made to the sequence of the special interrogatories put to the jury. In framing question one for the jury, the district court stated: "Did [Alexander's] employees have probable cause to arrest and detain Fernando Rojas?...If your answer is yes, stop. Come back and report to me. That will be your verdict. If your answer is no, if you find that they did not have probable cause, then you go on to question two [the policy question]" (A1-40). No request was made that a verdict be returned against

Alexander's on an adverse finding on the probable cause issue alone.

REASONS WHY THE WRIT SHOULD BE DENIED.

I

THE QUESTION OF WHETHER *MONELL* SHOULD BE EXTENDED TO PRIVATE CORPORATIONS SHOULD NOT BE DECIDED ON THE FACTS OF THIS CASE

While this Court has never addressed the issue of whether a private corporation should be vicariously liable for the Constitutional torts of its employees, the facts of this case, as recognized by the district court, do not require a decision on that issue, nor do they even fairly present the issue. This is so because the Petitioner did not present his case on a *respondeat superior* theory -- a theory that Jerry Diaz's unlawful arrest should impose liability on Alexander's. Rather,

Petitioner attempted to prove that Alexander's itself had a policy to discriminate and was therefore liable for its own corporate policy. It was only after the jury's finding that Diaz's arrest was without probable cause that Petitioner changed course and urged on appeal a theory of vicarious liability.

After the pendant state claims of false arrest and false imprisonment were dismissed as time barred, Petitioner was left with a single claim against Alexander's under Section 1983. Significantly, the claim was asserted only against Alexander's and did not charge an independent cause of action against Diaz (the employee who made the arrest), Luck (the "quasi-public" official who assisted in the arrest process), or any other Alexander's employee. Moreover,

there was never any claim that Diaz, Luck, or any other employee knowingly sought to arrest Petitioner out of a personal bias against Hispanics or on something less than probable cause. The only theory driving the complaint was a claim that Petitioner was arrested pursuant to *Alexander's* unstated policy of targeting Hispanics for shoplifting arrests.

Likewise, there was never a claim in the pleadings or at trial that Alexander's should have been accountable under a theory of *respondeat superior* for the arrest made by Diaz. It was only on appeal, after the jury had concluded that the arrest was without probable cause, that Petitioner advanced this theory. While a finding that probable cause was lacking would have supported the dismissed state claims, it would not, by itself,

support Petitioner's theory under Section 1983.

Even Petitioner recognized at the trial level that a mere mistake in judgment by Diaz would not rise to the level of a Constitutional tort. As a consequence, Petitioner sought to prove that his arrest was in furtherance of an illegal store policy to discriminate against Hispanics. It was this alleged policy -- and not the individual actions of any one employee -- that was challenged by Petitioner. Indeed, Petitioner's counsel acknowledged to the district court that Petitioner maintained the arrest was wrongful *because of a policy by Alexander's* of harassing Hispanics.

This concession was undoubtedly in recognition of the rule that something more than mere mistake is required to impose liability under Section 1983. See, *Baker v. McCollan*, 443 U.S. 137, 145 (1979); *Daniel v. Williams*, 474 U.S. 327, 328 (1986); *Smith v. Brookshire Bros.*, 519 F. 2d 93, 94 (5th Cir. 1975) (*per curiam*) (the mere fact that the store manager may have made a mistake in detaining customers suspected of shoplifting does not, by itself, make the store owner liable to customers for damages).

Recognizing that Petitioner did not plead a theory of *respondeat superior* premised on the conduct of any one employee, and where no proof was offered to support such a theory, the district court refused to decide the *Monell* issue, finding that:

> Even if the doctrine of *respondeat superior* does not apply to Section 1983 actions at all, plaintiffs, particularly in their papers in support of their motion to amend the complaint, have alleged that it was [Alexander's] unstated policy to arrest more readily on suspicion of shoplifting those customers who are black or Hispanic. This allegation, if true, would suffice to meet the requirements that a plaintiff show that official policy is the moving force behind the violation. See, *Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (A-15).

Even at the conclusion of the evidence at trial, Petitioner did not request that the district court submit an alternative theory to the jury on grounds of vicarious liability. Further, no objection was made to the first special interrogatory (whether there was probable cause to arrest Petitioner) even though it was evident that an answer against Alexander's on

that question would not automatically result in a verdict for Petitioner.

Petitioner argues that the trial court submitted the interrogatories to the jury as though *Monell* applied to private corporations. To the contrary, given the absence of pleading and proof against any individual employee, the trial court was bound to instruct the jury, even in the absence of *Monell*, that a mere mistake in judgment by Diaz would not rise to the level of a Constitutional tort, unless it could be shown that Diaz was acting in furtherance of a policy forbidden by the Constitution. Hence, contrary to Petitioner's claim, it was not an erroneous application of *Monell* which deprived him of a verdict, it was his own failure to prove a Constitutional tort. Had Petitioner

proved, for example, that Diaz had knowingly arrested Petitioner on something less than probable cause, or that he acted because of a personal bias toward Hispanics, the issue of Alexander's liability under *respondeat superior* would be fairly raised. However, the pleadings and proof at trial were directed toward Alexander's alleged policy of discrimination.

The Courts of Appeals that have considered the issue, including the Second Circuit in this case, have uniformly rejected the imposition of *respondeat superior* liability in Section 1983 cases. *Iskander v. Village of Forest Park*, 690 F. 2d 126, 128 (7th Cir. 1982); *Powell v. Shopco Laurel Company*, 678 F. 2d 504, 505-506 (4th Cir. 1982); *Draeger v. Grand Central, Inc.*, 504 F. 2d 142, 145-146

(10th Cir. 1974) (*pre-Monell* refusal to extend vicarious liability under Section 1983 because "[T]here is less reason for imposing vicarious liability...since the entire thrust of Section 1983 requires, consistent with the 14th Amendment, official state action.").

Should this Court decide to address the applicability of *Monell* to private corporations, a case closer to the facts of *Powell, supra,* would present a much better vehicle for decision. Unlike Petitioner's case, Powell predicated his theory against Shopco solely on common law principles of vicarious liability. There was no claim that Shopco knew of, condoned, or otherwise had a policy which encouraged illegal arrests. As the court noted, "Shopco's liability was laid solely on principles of *respondeat superior.*" *Powell,* 678 F. 2d at 504.

In sum, there is no need to decide the applicability of *Monell* to private corporations where a theory of vicarious responsibility was neither pleaded nor proven at trial. The jury's verdict, which exonerated Alexander's of having a policy forbidden by the Constitution, should stand.

II

FOLLOWING THE REASONING OF *MONELL*, THE SECOND CIRCUIT CORRECTLY REJECTED *RESPONDEAT SUPERIOR* LIABILITY IN SECTION 1983 ACTIONS AGAINST PRIVATE CORPORATIONS

While this Court has never addressed the issue of whether private corporations may be held accountable on a *respondeat superior* theory under Section 1983, it squarely rejected the imposition of such liability on municipalities in *Monell v. Department of Social Services*, 436 U.S. 658

(1978), and has consistently reaffirmed the correctness of that decision. *Polk County v. Dodson*, 454 U.S. 312, 325 (1981); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986); *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), and *Jett v. Dallas Ind. School District*, 491 U.S. 701, 105 L. Ed. 2d 598 (1989).

Interpreting the statute in light of its legislative history, this Court found that vicarious liability would be incompatible with the causation requirement set out in Section 1983. *Monell*, 436 U.S. at 690-691; *Praprotnik*, 485 U.S. at 122. This analysis of Congressional intent is equally applicable to private corporations as the Second Circuit and other Courts of Appeals considering the issue have found. *Iskander v. Village of Forest Park*, 690 F. 2d 126 (7th Cir. 1982);

Powell v. Shopco Laurel Co., 678 F. 2d 504 (4th Cir. 1982).

While accepting the *Monell* rule for municipalities, Petitioner urges that private corporations should be subject to the common law doctrine of vicarious responsibility. However, in *Monell*, this court found the traditional tort justifications underpinning the doctrine of *respondeat superior* insufficient to warrant the imposition of such liability in Section 1983 actions. *Monell*, 436 U.S. at 694. For liability to be imposed, Section 1983 demands nothing less than proof that the defendant "caused" the Constitutional deprivation. *Id.* at 691-692.

In a similar vein, Petitioner argues that corporations should be treated differently from municipalities because "A

corporation does not have a custom or policy -- it acts through its employees and is responsible for the actions of its employees." Petition for Certiorari at 7. This argument not only runs counter to common sense, it runs counter to Petitioner's own complaint alleging that Alexander's had a policy of discrimination in making shoplifting arrests -- a policy that guided all of its security personnel and explained what Petitioner claimed was the disproportionate number of "minority" shoplifting arrests. Without alleging such a policy, Petitioner could not state a claim out of the largely independent acts of the various persons involved in his arrest.

While conceding that *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970),

did not address the issue of whether a private corporation was vicariously responsible for the Constitutional torts of its employees, Petitioner nonetheless maintains that *Adickes* should control on the facts of this case. Petitioner's reliance on this ruling, as well as the district court in *Classon v. Shopko Stores, Inc.*, 435 F.Supp. 1186 (E.D. Wis. 1977) (the only reported decision against the extension of *Monell* to private corporations), is clearly misplaced.

In *Adickes*, Petitioner proceeded to trial on a substantive-count (that Kress' refusal to serve her was pursuant to a custom of the community to segregate the races in public eating places), *Adickes*, 398 U.S. at 147, and a conspiracy (that Kress' refusal of services and her subsequent arrest were the

product of a conspiracy between Kress' employees and the Hattiesburg police). *Id.* at 148.

Given the nature of these pleadings, there was never any question of vicarious responsibility. Under the substantive count, Adickes was bound to prove that Kress refused her service "because of a state-enforced custom of segregating the races in public restaurants." *Id.* at 171. Under the conspiracy count, Adickes had to prove that Kress' employees knowingly conspired with the Hattiesburg police to arrest her "because she was a White person in the company of Negroes." *Id.* at 152. In either case, Adickes was required to prove that the arrest was "caused" by an unlawful policy.

Here, misinterpreting *dicta*, Petitioner suggests that *Adickes* imposes vicarious liability upon an employer for the Constitutional tort of an employee, even where there is no proof that the employer "caused" the Constitutional deprivation. *Monell*, 436 U.S. at 691-692. Properly read, *Adickes* requires proof that the implementation of the proscribed policy was the object of the conspiracy and the "cause" of the arrest. Here, by contrast, Petitioner asks that Alexander's be held vicariously responsible where there is no proof that Alexander's had a policy to arrest suspects on less than probable cause; no proof that the "quasi-public" official knowingly conspired with the employee who made the arrest; and, where the jury specifically rejected a claim that Alexander's had a discriminatory

policy in making shoplifting arrests. Had Petitioner proven the causation required by *Adickes*, whether as a matter of conspiracy or as a substantive store policy, the jury would undoubtedly have returned a verdict in his favor.

In reality, Petitioner asks that Alexander's be found vicariously responsible for what the jury at best concluded was Diaz's mistake in arresting Petitioner without sufficient probable cause. If the reach of Section 1983 were extended to this point, every shoplifting arrest by a retailer such as Alexander's, where the charges are dropped, dismissed, or result in an acquittal, would give rise to a Constitutional tort. However, this extension is unwarranted and has already been rejected by this Court. As stated

in *Baker v. McCollan*, 443 U.S. 137, 145, 99 S.Ct. 2689, 2694 (1979):

> The Constitution does not guarantee that only the guilty will be arrested. If it did, Section 1983 would provide a cause of action for every defendant acquitted -- indeed for every suspect released.

Having lost his right to sue for the common law torts of false arrest and false imprisonment because of time bar, Petitioner is trying to dress these torts in Constitutional garb under Section 1983. This Court has frowned on that practice. In *Daniel v. Williams*, 474 U.S. 327, 328, 206 S.Ct. 662 (1986), the Court held that the Due Process Clause was simply not implicated by negligent conduct causing unintended loss of or injury to life, liberty or property, overruling its earlier suggestion in *Parratt v. Taylor*, 451 U.S. 526

(1981), that under certain circumstances a lack of due care could amount to a deprivation of life, liberty or property under the Fourteenth Amendment. The Court stated:

> Our Constitution deals with the large concerns of the governors and the governed but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States..." (citations omitted).

Daniel, 474 U.S. at 332.

In sum, as recognized by the Courts of Appeals considering the issue, *Monell* requires proof of specific causation before liability may be imposed under Section 1983. The common law doctrine

of *respondeat superior* must yield, even in the context of a private corporation, to what this Court found was mandated by the language and legislative history of Section 1983 -- proof that the Constitutional violation was "caused" by the defendant.

There is simply no reason on the facts of this case to revisit *Monell*, to disturb the uniform rulings of the Courts of Appeals, or to upset the jury's unanimous verdict.

III

THE COURT BELOW CORRECTLY DECLINED TO SUBMIT TO THE JURY A CLAIM OF DISCRIMINATION ON THE BASIS OF PETITIONER'S COLOR WHEN THE ONLY EVIDENCE PETITIONER OFFERED AT TRIAL WAS THAT HE WAS DISCRIMINATED AGAINST ON THE BASIS OF HIS SPANISH EXTRACTION

Petitioner argues that he was unfairly denied the opportunity to have

the jury decide whether his arrest was actuated by discrimination on the basis of his color as well as on the basis of his Spanish heritage. Petitioner claims he raised this issue in his pleadings and that the district court at first endorsed the theory as valid only to later "capriciously" reverse itself and refuse to submit the issue to the jury.

There was good reason the jury was never asked to consider whether Respondent discriminated on the basis of color: Petitioner adduced no direct evidence of such discrimination. Petitioner's theory at trial, consistent with the allegations in his complaint, was that he was singled out by Respondent because he was of Spanish extraction. He offered no evidence that he was arrested because of his color.